82-981

No.

In the Supreme Court of the United States

October Term, 1982

CLARK OIL & REFINING CORPORATION,
Petitioner,

vs.

HAROLD ALDERSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

When a verdict for nominal damage and substantial punitive damages returned against petitioner corporate employer and in favor of respondent employee, was based upon petitioner's alleged failure to write a letter required by a penal statute which must truly state for what cause the employee had left the employment and where the employer was subject to absolute civil liability for any alleged untrue or erroneous statements in the letter:

I. Can such liability be imposed against petitioner and other corporate employers under the statute which created liability by the use of general terms (i.e., "truly stating for what cause"), but failed to contain any specific standards or criteria by which to determine that liability, without violating the requirement of the Due Process Clause of the Fourteenth Amendment prohibiting the imposition of liability where the law fixing the same fails to give the employer fair warning or notice of what constitutes a true cause for a dismissal from employment or other required statements, and where the employer was exercising First Amendment rights in expressing its views about the employee?

II. Can punitive damages be recovered from the petitioner and other corporate employers under a generalized liability-creating statute which commanded that a letter issue, without requiring the jury to find actual malice, particularly where only an award of nominal damage was assessed, where the defenses of good faith or negligence in writing the letter were denied to petitioner, and where the cause arose out of the exercise of First Amendment rights of free expression by petitioner in setting forth its views as to the termination of the employee's service,

or does such a recovery under these circumstances violate the protections of the Due Process Clause of the Fourteenth Amendment and those of the First Amendment?

III. Does an award of damages against petitioner and other corporate employers under the absolute liability imposed by this statute violate the Equal Protection Clause of the Fourteenth Amendment by singling out only corporate employers for liability where there is no showing that the statute requiring or compelling this communication can be presently justified either under the traditional "rationality" test or the more strict "substantial governmental interest" test where fundamental rights such as freedom of expression are involved?

PARTIES TO THE PROCEEDINGS

This suit was filed originally by Harold Alderson against Clark Oil & Refining Corporation and Charles Palmquist in the Jackson County (Missouri) Circuit Court; at the time the case was submitted to the jury, Alderson had dropped his claims against Palmquist, and proceeded only against Clark. Palmquist was not a party to the appeals.

Petitioner is a privately held corporation, and has no public stock ownership.

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OPINIONS BELOW

The Circuit Court of Jackson County issued a short unreported written opinion, which is set forth in Appendix A to this petition. The opinion of the Missouri Court of Appeals, Western District is officially reported at 637 S.W.2d 84, and is set forth in Appendix C to this petition. The order of the Missouri Supreme Court denying transfer of the appeal from the Court of Appeals is unreported, and is set forth in Appendix B to this petition.

JURISDICTION

The judgment and opinion of the Missouri Court of Appeals, Western District, was filed on May 4, 1982. A timely petition for rehearing was filed with the Court of Appeals on May 19, 1982, along with an alternative

motion for transfer to the Missouri Supreme Court, which the Court of Appeals denied on June 23, 1982. A timely application to transfer the appeal was filed with the Missouri Supreme Court, which that Court denied on September 13, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Par. I, Amendment XIV and Amendment I of the Constitution of the United States; and Section 290.140, Revised Statutes of Missouri (1978). The pertinent provisions thereof are set forth in full in Appendix D to this petition.

STATEMENT OF THE CASE

Proceedings Below

Petitioner is a corporation engaged in retail gasoline sales through service stations operated within the State of Missouri by its employees. At the time of the events giving rise to this litigation, Missouri had a penal statute (§290.140, Revised Statutes of Missouri), applying to such corporate employers only, requiring it to furnish a letter upon request of a "laboring man quitting service of [a] corporation", signed by the entity's superintendent or manager, and setting forth: the nature and character of service rendered by the employee, the duration thereof, and the true cause why the employee quit such service. This law (colloquially known as the "Service Letter Statute"), further provided that if any superintendent or manager failed or refused to issue the letter when re-

quested, they "shall be deemed guilty of a misdemeanor," and fixed the punishment by fine or by imprisonment in jail, or both. (The statute's text is at App. D). The statute, enacted in 1905, made no provision for a private cause of action for damages against the corporation, but in 1916 the Missouri Supreme Court held that such a cause could be maintained by a former employee, whose officials had failed to provide a letter, which truly stated the reason, if any, for the employee's departure from the corporation's service. *Cheek v. Prudential Insurance Co.*, (Mo. 1916) 192 S.W. 387, 391.

This cause originated in December 1976, when Respondent employee, Harold Alderson, left his employment as a station manager for Clark. He thereafter, through his attorney, requested a service letter from Petitioner, which was sent him, and read as follows:

"December 22, 1976
Mr. Harold Alderson
554 Oxford
Independence, Missouri 64053

Dear Mr. Alderson:

This is in response to your letter of December 15, 1976. Be advised that you were employed by Clark Oil & Refining Corporation as a manager of one of our stations. In such capacity, your responsibilities included the general management of our station located at 202 West 23rd Street, Independence, Missouri. I have enclosed a copy of a job description for a further amplification of your duties as manager. You were employed from July 2, 1975, until December 17, 1976, and the reason you were terminated was that your performance simply was not satisfactory to Clark. That is, the station and its facilities were not main-

tained to Clark's standards, you did not furnish your Master Reports in a timely fashion to Clark, and on December 7, 1976, an audit uncovered a loss of almost $400.00 at the station you were managing.

Very truly yours,

Clark Oil & Refining Corporation

David W. DeNeff
District Manager"

Thereafter, Alderson filed suit for damages against Clark and one Charles Palmquist (who worked for Clark in a supervisory capacity at the time of Alderson's departure from Clark) in the Missouri Circuit Court. The cause was tried to a jury in October 1980 for a second time (an earlier verdict had been set aside and a new trial ordered), resulting in a verdict against Clark for one dollar nominal damage and one hundred thousand dollars punitive damages. Alderson did not submit against Palmquist.

Upon Clark's motion for judgment N.O.V. or new trial, the trial court set aside the punitive damages award but left intact the nominal damage verdict. The trial court determined that the evidence failed to support the punitive damages submission, but overruled petitioner's constitutional challenges to the statute and the nominal damage verdict. The court also granted the alternative new trial motion as to punitive damages. (See App. A). Thereafter both petitioner and respondent appealed the trial court's judgment to the Missouri Court of Appeals, Western District.

The Court of Appeals, on May 4, 1982, reversed that part of the trial court's judgment which set aside the punitive damages award, and likewise reversed the new

trial award and reinstated the verdict against petitioner. The Court of Appeals also sustained the trial court's judgment denying petitioner relief against the nominal damage verdict. See 637 S.W.2d 84. (A copy of the Court of Appeals' decision is set out at App. C). Clark's motion for rehearing or, alternatively, for transfer to the Missouri Supreme Court was overruled by the Court of Appeals on June 23, 1982, and an application to the Supreme Court was unavailing, being denied on September 13, 1982.

Details of the Case

Alderson had been employed by Clark since July 1975, and was promoted to service station manager in May 1976. He continued to manage a Clark station until he left Clark's employment in December 1976. His immediate supervisor was the retail sales representative, Charles Palmquist, who in turn was supervised by the district manager, David DeNeff.

On December 7, 1976 Alderson was on his way home after work and stopped at another Clark station to see a Bob Thompson, its manager. There Alderson met Charles Palmquist, his supervisor, who suggested that the three of them go out for a drink. Thompson declined, but Alderson and Palmquist left for a nearby lounge, where they remained for several hours. During the evening, Palmquist asked Alderson for his opinion of Thompson's potential for advancement, and Alderson indicated his lack of confidence in Thompson's ability because of alleged shortages at his station. This statement apparently upset Palmquist who suggested that Alderson was probably the one whose station was short. Alderson offered him the keys to the station and invited Palmquist to conduct an immediate audit. Palmquist declined.

After the two had parted company, Alderson returned to his station. Palmquist preceded him, and appeared to be intoxicated Alderson summoned the police who asked Palmquist to leave, which Palmquist did, but before leaving the station he attempted to call the district manager, DeNeff, to inform him of what was going on. (Transcript, hereafter "T.", 62) Alderson said that he himself did not attempt to talk to DeNeff nor try to reach him that evening. (T. 62) He testified that he had been fired by Palmquist that night (T. 67), although DeNeff said it was on December 8 (T. 184). Rather than lock the station and leave after Palmquist left, he destroyed the company safe, holding money collected at the station, by drilling the cast iron steel for approximately 1½ hours until he got the money out. He testified that he destroyed the safe, even though no one else including Palmquist could have opened it that evening, by use of a drill from his car. (T. 64) In response to a question of whether or not the drilling of the safe took place *after* Palmquist had fired him, Alderson indicated that it had. (T. 58)

In direct examination Alderson maintained that he had Clark's authority to take the money from the station, without any mention of Palmquist firing him. (T. 33) He testified that the following morning Palmquist was interested in forgetting the whole incident but apparently Alderson was not interested in continuing with his employment. (T. 34-35)

DeNeff testified that Palmquist had contacted him the evening of December 7, and informed him to some extent of what was occurring. (T. 126-127) Next morning DeNeff went to the station where Palmquist only was present conducting an audit. (T. 128) DeNeff noticed that the safe had been drilled out, and the money missing. (T. 128) DeNeff called Alderson and asked him what

had happened, and asked where the money and the reports were. (T. 129) Alderson at that time informed DeNeff that the reports and money were at his lawyer's office. (T. 129) DeNeff told Alderson that unless he turned over the money and reports, that he would have to go to the prosecutor (T. 129) DeNeff and Alderson agreed to meet and Alderson agreed to turn over the money and reports. (T. 129)

At the meeting on December 8, according to Alderson, DeNeff indicated that he would reprimand Palmquist, or lay him off, and would consequently think of some reason for terminating Palmquist. (T. 26) Alderson said that at that time the possibility of his staying with Clark was not discussed. (T. 36)

On December 9 DeNeff met Alderson at a bank, where Alderson returned the money. Alderson made no mention of any discussion at the bank regarding his future employment with Clark. (T. 40)

Alderson's first, and only mention in direct examination, of an alleged statement by DeNeff to make up a reason to fire Alderson rather than Palmquist, came in a description of what Alderson did after he left the bank. Alderson testified that he contacted his attorney, and he responded as follows to a question by his lawyer:

"Q. Alright and what was your concern at that time Mr. Alderson?

A. Mr. DeNeff had told me he would have to fabricate some reasons for termination because they were doing it, and I didn't understand why he would have to fabricate a reason for terminating, so I contacted you to find out what I should do." (T. 40)

There is no testimony which fixes a date upon which DeNeff allegedly made this statement, nor in what context the alleged statement was made, or precisely what was said. Alderson contradicted his own testimony on this issue when he later testified that it was on December 8, not on the 9th, that he first contacted his attorneys (T. 68, 82), while DeNeff testified that Alderson told him on the 8th that he already contacted his lawyers. (T. 130)

The only other mention of the alleged statement about making up a reason to fire Alderson came in cross-examination where Alderson indicated that the only explanation that he could give why DeNeff would have told him that he would have to make up a reason to terminate him. (T. 69-70) DeNeff testified that nothing in his personal dealings with Alderson would have affected his judgment in sending Alderson the letter (T. 138), which was not contradicted by Alderson.

On December 15, Alderson requested the service letter. The letter recited that Alderson had been employed by Clark from July 2, 1975 until December 17, 1976, when he was terminated due to poor maintenance of the station, untimely filing of master reports and a shortage of $400.00 uncovered in an audit on December 7, 1976. DeNeff said the audit revealed a shortage of $696.55, including $78.00 in employee loans (T. 162), and employee shortages of $200.00 to $300.00 (T. 133-134), both of which were uncollectable. (T. 168) He testified that a further difference between the two audit figures was a damaged merchandise figure of $84.87. (T. 171) As far as DeNeff was concerned on December 8th, Alderson was $2300.00 short, because that was the amount needed to be accounted for by the audit conducted on that day. (T. 173-182)

DeNeff signed the service letter, which was sent out about December 22 upon the request of Alderson and his lawyers, and was based upon information given by DeNeff. The letter gave Alderson's dates of employment as July 2, 1975 to December 17, 1976, the latter date admittedly a typographical error. As reasons for leaving the employment, the letter recited that Alderson had failed to satisfactorily maintain the station and its facilities; had failed to furnish master reports in a timely fashion; and that on December 7, 1976, an audit uncovered a loss of almost $400.00 at the station. Evidence given by DeNeff at the trial was that he based the letter upon his views that Alderson had failed to keep the station up to the standards that Clark required (e.g. see T. 123-124, 184-185); that Alderson had failed to send in his daily master reports on time (e.g. see T. 121-122, 125-126, 184-185); and that the audit run on December 8 demonstrated a shortage at the station of about $400.00 (e.g. see T. 131-135, 184-185), shortages about which DeNeff was aware when he wrote the service letter in issue (T. 146, 184-187). DeNeff also testified that December 7 was the last day that Alderson had worked, but that he was fired the next day (T. 185), 8 December.

No one, other than Alderson ever requested or inquired of Clark to see the letter. (T. 142) Alderson offered no examples of any employers receiving any information from Clark, directly or indirectly, regarding the letter or its contents, nor did any prospective employer ever indicate that Clark had given Alderson a negative reference.

Alderson presented only one example of a prospective employer to whom he had allegedly shown the letter, a credit union in May or June 1980. (T. 50-51, 79) However, the union's collection manager, to whom Alderson

applied, testified that he did not know what a service letter was (T. 191); that he did not recall the contents of any such letter (T. 194); and that Alderson lacked the experience and qualifications for the job without regard to any letter. (T. 193) Furthermore, the manager testified that Alderson did not really seem interested in the credit union job, because of his other interests pertaining to this lawsuit which was then pending against his former employer, Clark. (T. 194)

In setting aside the punitive damages award, the trial court found that:

> "There was no evidence upon which the jury could have found defendant had an ulterior motive, that the purported reasons defendant stated in its service letter were other than mistakes of fact or that defendant's conduct in writing its service letter in the manner in which it did was either willful, wanton, or malicious, that is, intentionally wrongfully written without just cause or excuse and that, therefore, the Court erred in submitting such issue and the jury's verdict, therefor and judgment thereon is and was erroneous and, as stated, not supported by competent and substantial evidence." (App. A).

Presentation of Federal Questions

Petitioner Clark challenged the constitutionality of the statute (§290.140, R.S.Mo.) and its application in an amended answer filed in March, 1980 (Record, Legal File, 49-51), and in August 1980 by way of a summary judgment motion filed in the trial court (Record, Supplemental Legal File, 30-33), which trial court overruled on September 2, 1980, without setting forth any reasons. Petitioner renewed the challenges at trial (T. 8-9, 117),

and again urged the constitutional claims in its motion for judgment N.O.V. (R., L.F., 72-86; also R., Supp. L.F. 1 et seq.), all of which the trial court overruled without stating reasons. (R., L.F., 87-89) Petitioner had challenged the statute on a number of federal grounds under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the freedom of speech proviso of the First Amendment, and included such claims as unconstitutional imposition of punitive damages without the necessity of finding actual damages, denial to petitioner of such defenses as good faith and so on, failure of the statute and its constructions to give petitioner corporate employer fair notice of what constituted a proper response to a service letter request, particularly as to what constituted a "true" reason for discharge; the law's application only to corporate employers, without the showing required by the Equal Protection Clause as to why it so discriminated, particularly when viewed in the light of its restrictions upon the petitioner's rights of corporate free speech; and other reasons. (R., Supp. L.F., 30 et seq.)

Petitioner appealed the trial court judgment denying the constitutional objections. (R., L.F.) The Court of Appeals rejected Petitioner's constitutional claims for the reason that "[a]ll the constitutional arguments advanced in Clark's brief have been considered by our Supreme Court (since Clark's brief was filed) and rejected. Hanch v. KFC National Management Corp., 615 S.W.2d 28 (Mo. banc 1981); *Accord*: Rimmer v. Colt Industries Operating Corp., 656 F.2d 323 (8th Cir. 1981)." (See C.A. Opinion, App. C, 637 S.W.2d at 85). While the Court of Appeals offered the observation that Clark in oral argument acknowledged the statute's constitutionality was "not now a viable issue" (App. A, 637 S.W.2d at 85-86), that characterization was inaccurate in that Clark's counsel pre-

served the constitutional challenges as demonstrated in the transcript of oral argument. (See App. E). Petitioner renewed the constitutional issues on May 19, 1982 in its motion for rehearing or alternatively for transfer to the Missouri Supreme Court, which the Court of Appeals denied without comment on June 23, 1982. Clark then filed its motion in the Missouri Supreme Court, asking that tribunal to transfer the case to examine the constitutional issues, along with other matters decided in the Court of Appeals' opinion, but which that Court denied without reasons on September 13, 1982. (See App. B).

REASONS FOR GRANTING THE WRIT

I.

This Court has repeatedly recognized that under the Due Process Clause no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes; and that the terms of a penal statute creating an offense unknown to the law must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, a requirement consonant with the ordinary notions of fair play and the settled rules of law. See *Giaccio v. Pennsylvania,* (1966) 382 U.S. 399, 400-405; *Thornhill v. Alabama,* (1940) 310 U.S. 88, 100; *Lanzetta v. New Jersey,* (1939) 306 U.S. 451, 453; and *Hynes v. Mayor of Oradell,* (1976) 425 U.S. 610, 620; to cite just a few examples.

The penal statute in this case, which forms the only basis for the cause of action against corporate employers, commands that such an employer truly state for what cause an employee has quit the employer's service and certain other information, but beyond this general

liability-creating charge it is completely devoid of specific guidelines or criteria by which to advise the employer of what constitutes a response sufficient to protect itself from liability when responding to the request for such a letter. Then by way of compounding the difficulty, the courts have in effect stripped the employer of any defenses such as good faith in writing the response or negligence in doing so, *Roberts v. Emerson Elec. Mfg. Co.*, (Mo. 1960) 338 S.W.2d 62, 72; *Potter v. Milbank Mfg. Co.*, (Mo. 1972) 489 S.W.2d 197, 206. And because the statute requires the corporation to affirmatively respond by a proper letter such is an intrusion or restriction upon the right of corporate speech, thereby raising a question of First Amendment rights.

There is no civil cause of action for damages at common law for a service letter such as this. Although the cause of action is solely based upon a state statute, § 290.140, R.S.Mo. (1978), it does not provide for any such action, rather the cause was implied by the courts from the statute, *Cheek v. Prudential Ins. Co.*, (Mo. 1916) 192 S.W. 387. When *Cheek* reached this Court in 1922 (see 259 U.S. 530), the issues raised were not the ones presented here, for example the Court never discussed nor decided the question of constitutional vagueness of the statutory language, nor the imposition of substantial punitive damages with requiring a finding of actual malice, nor was the equal protection ruling based upon the considerations that have been asserted here, rather it was upon 1922 considerations which reflected a much different economic, social and constitutional fabric than exists some 60 years later, as illustrated by the developments in the field of corporate free speech, and the extension of many, if not most, of the basic constitutional guarantees to the corporate form of business entity. *Cheek* was decided in a far different

era, when corporations were still a main point of regulatory focus, and when many forms of economic and social legislation were confined solely to them, having not yet been extended to cover other forms of business entities, as is now the case (see the discussion under Point III here). In fact much of the equal protection/due process determinations in *Cheek* were concerned with allegations of a conspiracy between insurance carriers (see 259 U.S. at 546-548) to deprive plaintiff of his right to sell insurance, as opposed to the issues raised here.

Over the years the courts have interpreted the statute in a confusing, contradictory and uncertain manner, a fact which has not escaped unnoticed by some courts, e.g. *Rimmer v. Colt Industries*, (C.A. Mo. 1981) 656 F.2d 323. The Court of Appeals noted that they would read certain state court decisions construing the law "more narrowly" than certain later state court rulings, *Id.* at 326, while another judge specifically noted (*Id.* at 331) the unevenness and lack of clarity in the holdings.

Against this background, petitioner contends that the application of this statute raises serious constitutional questions, both from a facial standpoint and that of application, particularly where it penalizes by imposing absolute liability under general and vague language without containing ascertainable standards, guidelines or conditions whatsoever as to what is meant by "truly stating" the cause for an employee's termination or with regard to the other items in the statute, so as to allow an employer to respond in a manner so as to protect itself and to allow a judge or jury to intelligently consider the liability issue. In this regard the vague language of the statute raises a question of deficiency such as was held violative of due process in such cases as *Giaccio*, where the employment of general abstract charges as "misconduct" and "represensible

conduct" was condemned, or in *Thornhill*, where the phrase "without just cause or legal exercise" failed to pass constitutional muster.

What is meant by "truly stating the cause"? Does it mean "just", or "correct", or "substantially true", or "honest" or "sincere"? What happens if there are multiple grounds as set forth which is the case here? If one ground is erroneous, and the others correct, does one erroneous ground by itself establish liability? Is an employer liable if there was an "honest" or "sincere" or good faith belief that the reasons or any part thereof are true, even though subsequent events may prove them incorrect? Is the employer liable where reasons given in a letter are believed correct, but the jury believes that other or additional reasons should have been included? Is an employer liable for honest though negligent mistakes? The fact is, the statute is so vague and standardless it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case, see *Giaccio v. Pennsylvania, supra* at 402-403.

The Missouri courts have consistently failed to specifically address this constitutional objection or have deliberately avoided doing so, not only in this case, but in other recent cases where they have evaded ruling or failed to specifically rule on federal constitutional objections. A good example is *Hanch v. K.F.C. Nat. Management Corp.*, (Mo. en banc 1981) 615 S.W.2d 28, 34, where by a one vote majority, the Missouri Supreme Court upheld the statute's constitutionality, yet, failed to *specifically* address the due process claim that the law provided no guidance as to what type of response constituted a proper service letter, choosing instead to avoid by means of conclusory assertions that carefully avoided federally-predicated objections.

Where a statute fails to provide required guidelines or standards, it allows the triers of fact to treat these cases as wrongful discharge actions, instead of actions under the Service Letter Statute, a situation analogous to that of *Vaca v. Sipes,* (1967) 386 U.S. 171, 188-195, where this Court ruled that a verdict was erroneously sustained where the case had actually been tried on the theory that an employee had been wrongfully terminated, when in fact the real issue should have been whether a labor organization had fairly and in good faith processed the employee's grievance as to the termination.

Lack of Defenses. As stated earlier, the difficulty in constitutionally applying the statute is compounded by decisional law, which refuses to allow the corporate employer to instruct the jury on its good faith in writing the letter or where it may have negligently drawn a response, as defenses, see *Potter v. Milbank Mfg. Co., supra,* and *Roberts v. Emerson Elec. Mfg. Co., supra,* or where it may have mingled some true statements as to termination with incorrect statements, or where the reasons that it gave in the letter may all have been correct, but the employer forgot or overlooked including another one. Yet nowhere in the statutory language are such defensive matters prohibited. Like the creation of the cause of action itself, such defenses are excluded only by judicial creation, and not by any express exclusion in the language of the statute. To make matters worse, the decisions hold on the one hand that the penal law is to be strictly interpreted in favor of the employer and against the employee's claim, see *Horstman v. General Elec. Co.,* (Mo.App. 1969) 438 S.W.2d 18, but then likewise refuse to recognize defenses such as good faith, etc., although this Court in *New York Times v. Sullivan,* (1964) 376 U.S. 254, 279-283, has recognized a qualified privilege of honest mistake of fact under the First and Fourteenth Amendments as a legitimate defense.

Impingement on the Exercise of First Amendment Rights. First of all, corporations are persons within the meaning of the Due Process Clause, which prohibits a state from depriving them of property without due proess of law. *Grosjean v. American Press,* (1935), 297 U.S. 233, 244. Secondly, when a statute also impinges upon First Amendment guaranties of the exercise of free speech, the constitutional vices of the law working a deprivation of property are enhanced. This Court in *First National Bank of Boston v. Bellotti,* (1978) 435 U.S. 765, has clearly recognized the application of the free speech guaranties to corporations, and under the *New York Times, supra; Gertz v. Robert Welch, Inc.,* (1974) 418 U.S. 323, 350; and *Givhan v. Western Line Consol. School District,* (1979) 439 U.S. 410, 413, line of decisions has increasingly recognized rights of free expression, in areas of public and private communications, and has restricted statutory interference in these areas. Here the application of a statute directed only against corporate employers which is vague and uncertain in its liability-creating terms, which in the total absence of statutory authority to do so denies the employer defenses by way of judicial decision, which permits unlimited punitive damages based upon a nominal damage award but without a finding of actual malice, and which interferes with the exercise of corporate rights of free speech raises what petitioner believes are serious constitutional questions that this Court should resolve.

II.

There is a conflict between the federal and state courts in Missouri over whether punitive damages can be assessed without first finding actual malice. Federal district courts, at least in the Western District of Missouri, instruct their juries in service letter cases that actual malice must be

found first before punitive damages can be imposed, e.g. *Walker v. Modern Realty of Missouri, Inc.* (Docket No. 80-0077-CV-W-1). The U. S. Eighth Circuit Court of Appeals considered constitutional challenges to the statute in *Rimmer v. Colt Industries*, (C.A. Mo. 1981) 656 F.2d 323, reversing 495 F.Supp. 1217 (W.D. Mo. 1980), and expressed the view that:

> "We do not decide the issue whether the service letter statute would be constitutional if it imposed liability without fault or permitted the recovery of punitive damages without a showing of actual malice. We can decide that question when it is properly before us. Moreover, we do not necessarily agree with the district court's view that the Missouri Supreme Court has decided these issues in the way the district court determined it has. *We read Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197 (Mo. 1972) *and Roberts v. Emerson Electric Mfg. Co.*, 338 S.W.2d 62 (Mo. 1960) *more narrowly than the district court, particularly in light of the recent Missouri Court of Appeals' decision in Newman v. Greater Kansas City Baptist Hosp. Ass'n*, 604 S.W.2d 619 (Mo.App. 1980). [Other Missouri citations omitted]." (Emphasis supplied).

Rimmer raises the implication that the statute could not be constitutionally applied to allow punitive damages without finding actual malice, but does so by reading state court decisions more narrowly than do the state courts themselves, e.g. see *Hanch v. K.F.C. Nat. Management Corp.*, (Mo. en banc 1981) 615 S.W.2d 28. A concurring opinion in *Rimmer* stated:

> "The majority opinion assumes that Rimmer can recover punitive damages only by proving that 'the reasons stated in the letter for the discharge were

> false, that Colt knew they were false, and nonetheless wantonly and maliciously issued the letter.' Based on this assumption, I believe that the majority's standard for imposing punitive damages represents the minimum requirements for upholding the statute against attack on first amendment grounds." (656 F.2d at 331).

The federal courts of the Western District of Missouri have so interpreted *Rimmer*, and their instructions require a finding of actual malice. Yet for reasons yet to be articulated, legal malice continues to be used by state courts without explanation or reason for doing so.

Nevertheless in spite of the federal court decisions, which appear to be reading the state decisions in a more restrictive fashion because of the constitutional implications, the decisions of the state appellate courts have not hesitated to expansively read the penal statute to allow the imposition of substantial punitive damages without requiring juries to find actual malice. *Hanch v. K.F.C. Nat. Management Corp., supra; Herberholt v. DePaul Community Health Center*, (Mo. en banc 1981) 625 S.W.2d 617, 624. Under the pattern instructions (Missouri Approved Instructions or M.A.I.) which the state supreme court requires be used to instruct a jury in these cases, the jury is instructed that punitive damages may be awarded if you believe that the defendant's conduct was malicious (M.A.I. No. 10.01, see App. F), which term is defined for the jury as legal rather than actual malice as follows:

> "malicious as used in these instructions does not mean hatred, spite or ill will, as commonly understood, but means the doing of a wrongful act intentionally without just cause or excuse." (M.A.I. No. 16.01, see App. F).

There are no defensive M.A.I.s available to the corporate employers because, as already noted under Point I here, the courts have determined, without advancing any justification therefor, that the employers are not entitled to raise defenses such as good faith or negligence. E.g. *Potter v. Milbank Mfg. Co.*, (Mo. 1972) 489 S.W.2d 197, 206; *Roberts v. Emerson Elec. Mfg. Co.*, (Mo. 1960) 338 S.W.2d 62, 72.

It is readily apparent from a reading of decisions such as *Rimmer*, that the federal courts are concerned with the imposition of punitive damages on the basis of a finding of legal malice only, notwithstanding a contrary view held by the state courts. The clear concern of the federal courts is with an impairment of the corporate employer's First Amendment rights of free expression as outlined, for example, in the *Rimmer* case (especially see 495 F.Supp. at 1222-1223; and 656 F.2d at 326-327, 331 (concurring opinion)), wherein a concurring judge held that the district court analysis of the First Amendment rights was correct, and therefore under the standard laid down by this Court in *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, 349, as applied to the service letter cases, a plaintiff, to recover punitive damages, must prove by a preponderance of the evidence that an employer made a false statement, knowing it to be false or with reckless disregard for its truth. 656 F.2d at 331. However, as stated under Point I of this petition, this is not the rule as set forth by state court decisions such as *Hanch* which in effect reject the concept of corporate free speech by simply replying that a corporate employer is only being required to speak truthfully, 615 S.W.2d at 35, but glossing over the infirmities in the statute *which prevent such compliance.*

Without unduly rehearsing the past, this Court has developed its line of authority on the media cases, such as *Gertz, New York Times v. Sullivan,* (1964) 376 U.S. 254, 279-80; *Curtis Publishing Co. v. Butts,* (1967) 388 U.S. 130, to confer free speech protection to various classes of private expression, e.g. *Givhan v. Western Line Consol. School Dist.,* (1979) 439 U.S. 410, 413, and in *First Nat. Bank of Boston v. Bellotti,* (1978) 435 U.S. 765 to corporate persons.

The difficulty with punitive awards under the statute such as the one challenged here runs deep because the statute's language fails to provide the corporate employer with fair notice of what constitutes a proper response to a request for a service letter, and then exacerbates the employer's position by denying it defenses such as good faith or negligence in responding, which has the effect of making the employer strictly liable for these damages regardless of how insignificant an error in the response may have been and despite the fact that the statutory language nowhere outlaws such defenses.

In light of the rules developed by this court for assessing punitive damages in the media cases such as *Gertz,* and where the mode of creating liability is viewed within the constitutionally vague context of the Due Process Clause, there is a serious unresolved issue of how far legislatures and courts may go in imposing such punitive damage liability under the guise of regulation.

III.

The statute applies to corporate employers only without any discernible justification which satisfies either of the tests developed to examine legislation under the Equal Protection clause. The statute was enacted as an adjunct to the state anti-blacklisting law, §559.390, R.S.Mo. (1969); *Cumby v. Farmland Industries,* (Mo.App. 1975)

524 S.W.2d 132, 135, but that statute was repealed in 1977 when the new Missouri criminal code was enacted by the legislature, and is therefore no longer a viable argument to support the Service Letter Statute. If the statute was designed to protect the reputations of employees it is underinclusive because it covers only those who work for corporations, and ignores the many persons employed by employer entities not covered by the law. As presently applied, it protects not only the reputations of employees who may actually have sustained actual injury to reputation, which is not the case here because the proof clearly established that Alderson did not use the letter, but also employees whose reputations have not sustained any actual injury, as is the case here, so that the §290.140 is overinclusive as well.

There has been no rational distinction developed in the case law (state or federal) construing the statute that demonstrates a present justification for the law, either under the "substantial interest" test applied when fundamental rights such as free speech are involved, e.g. *Police Dept. v. Moxley*, (1972) 408 U.S. 92, 95, or under the more traditional "rationality" test, prohibiting arbitrary statutory classification, which classification to be valid must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. *Stanton v. Stanton*, (1975) 421 U.S. 7, 14. Yet here there is no rational basis to distinguish between corporations on the one hand and other types of employers entities such as partnerships or individuals on the other. In today's world is an employer more suspect because it takes a corporate form than another type, or does the common experience give rise to judicial notice or established fact that corporations are more of a problem than other forms of business entities?

If corporations are generally such a special regulatory problem, in Missouri, or elsewhere, then why are most of the laws affecting the employment rights of individuals usually made applicable to broad categories of employers that include persons, individuals, partnerships, associations, corporations, trustees, receivers, and so forth, e.g. workers' compensation, §287.030; unemployment benefits, §288.030 (14); limitations upon working hours, §290.020; payment due a discharged employee, §290.110, all in the Revised Statutes of Missouri (1978)? Nor in the case of injury to reputation, does the law appear to distinguish between corporations and other persons in imposing liability for such injuries, e.g. 53 C.J.S., Libel & Slander, §148. And, of course, as noted earlier, the state anti-blacklisting statute was repealed in 1977 by the legislature.

The question arises as to why out of such a background corporate entities are singled out for special treatment? We submit that there is no rule of law which holds that corporate employers are more or are less truthful in their dealing with their employees than other classes of employer.

Or is the reason for the survival of this discriminatory and arbitrary classification a more subtle one, namely a way to impose liability for an alleged wrongful discharge under the guise of an allegedly untruthful service letter, which poses the same essential problem faced by this court in *Vaca v. Sipes*, (1967) 386 U.S. 171, 193-195 (there the jury verdict was found to be based not upon the issue of good faith, or more particularly the lack thereof, of the union in handling the employee's grievance, but rather upon the merits of the grievance itself, and in effect a form of action for wrongful discharge).

The denial of equal protection is enhanced by such additional factors as the decisional law which allows un-

limited punitive damages based upon a nominal award of actual damages, without a showing of actual malice in these cases, *Heuer v. John R. Thompson Co.*, (Mo.App. 1952) 251 S.W.2d 980, 985; also Missouri Approved Instructions (M.A.I.) 23.08 and 16.01; the refusal of the Missouri courts to recognize good faith or negligence as a defense in these cases, e.g. *Potter v. Milbank Mfg. Co.*, (Mo. 1972) 489 S.W.2d 197, 206, also see M.A.I. 23.08, although the Service Letter Statute does not contain any language which excludes such defenses; and the vague and uncertain vice of the statute, which is urged here as a reason for review by petitioner under Point I of these reasons. Additionally, and of equal importance, is the question of First Amendment rights of free expression which petitioner corporation urges have been infringed upon by the application of the Service Letter Statute requiring the petitioner to speak without allowing petitioner and other corporate employers the same constitutional safeguards extended to others and by imposing absolute liability upon corporate employers only for the slightest infraction, no matter how innocently or unimportant the infraction may have been.

It is urged that the same rationale present in the arguments advanced under Points I and II here, as to the conflict between the decisions of this Court on Due Process and First Amendment grounds are equally applicable under this point. Furthermore, it is also strongly urged that since the decision of this Court in *Prudential Insurance Co. v. Cheek*, (1922) 259 U.S. 530, the law regarding the scope of economic regulation and its relationship to the rights of persons, including corporations, has undergone radical revision, e.g. witness *First National Bank of Boston v. Bellotti*, (1978) 435 U.S. 765, and to whatever extent the *Cheek* decision may still have application is deserving of reexamination.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RUSSELL D. JACOBSON
(Counsel of Record)
THOMAS B. SULLIVAN, III
WILLIAM R. WILLIAMS
2546 Holmes
Kansas City, Missouri 64108
(816) 474-0400
Attorneys for Petitioner

December 10, 1982

APPENDIX

APPENDIX A

Unreported Opinion of the Jackson County (Missouri) Circuit Court

Circuit Court
Sixteenth Judicial Circuit of Missouri
Division One
Court House, Kansas City 64106

William J. Marsh, Judge

January 15, 1981

Thomas B. Sullivan III
Crown Center, Suite 672
2400 Pershing Road
Kansas City, Missouri 64108

Michael W. Manners &
Robert J. Graeff
311 West Kansas
Independence, Missouri 64050

Gentlemen:

Enclosed is a self-explanatory copy of the Order and Judgment entered in this cause this day. The parties and their attorneys should understand that this result is based solely upon what I view the evidence in the case and the applicable law require and not in any way upon my opinion as to the constitutionality or unconstitutionality of Sec. 290.140, V.A.M.S., as evidenced by the overruling of defendant's motions on the latter ground.

Very truly yours,

/s/ William J. Marsh
William J. Marsh

IN THE
CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI

Case No. CV77-0874
Civil Docket "H"
Division 1

HAROLD W. ALDERSON,
Plaintiff,

vs.

CLARK OIL & REFINING CORPORATION,
Defendant.

ORDER AND JUDGMENT

Now on this day defendant's motion for a Judgment Notwithstanding the Verdict or in the Alternative For a New Trial having come on for hearing and argument January 9, 1981, the parties appearing therefor by their respective attorneys and the Court having heard the arguments of both parties and having considered their briefs in support thereof and in opposition thereto and having taken the matter under advisement and now being fully advised in the premises now finds that, considering all of the evidence in the light most favorable to the plaintiff, there was evidence upon which the jury could find that defendant's service letter did not truly state all the reasons or causes of plaintiff's termination and could have found that he was terminated because he retained some of defendant's money for safekeeping purposes in violation of defendant's instructions and damaged defendant's safe by drilling out the lock and by having a serious dispute or series of disputes with one of defendant's supervisors and, further, could have found that the service letter defendant sent in response to plaintiff's request both incorrectly stated the date that an audit was conducted and the dollar

amount of shortage an audit taken on a date other than as set forth in defendant's service letter; the Court is of the further opinion that there was no evidence upon which the jury could have found defendant had an ulterior motive, that the purported reasons defendant stated in its service letter were other than mistakes of fact or that defendant's conduct in writing its service letter in the manner in which it did was either willful, wanton or malicious, that is, intentionally wrongfully written without just cause or excuse and that, therefore, there was insufficient evidence in this case to submit the issue of punitive damages, and that, therefore, the Court erred in submitting such issue and the jury's verdict, therefore and judgment thereon is and was erroneous and, as stated, not supported by competent and substantial evidence.

Accordingly, defendant's Motion Not Withstanding the Verdict should be and the same is hereby sustained and defendant's Alternative Motion for New Trial solely on the issue of punitive damages should be and the same is hereby sustained and, further, the Court is of the opinion that defendant's motions in all other respects should be and the same are hereby overruled.

WHEREFORE IT IS ORDERED AND ADJUDGED that the verdict and judgment in favor of the plaintiff and against the defendant for the sum of $100,000.00 as punitive damages, only, be and the same is hereby vacated, set aside and for naught held, that if the judgment is hereafter vacated or reversed, defendant be and hereby is granted a new trial on the issue of punitive damages for the reason that there was insufficient evidence in this case to make a submissible case thereon, as alleged in paragraph 9 of defendant's Alternative Motion.

Accordingly it is ordered and adjudged and decreed that plaintiff Harold W. Alderson have and recover of

defendant Clark Oil & Refining Corporation the sum of One Dollar as actual damages and his costs herein expended and have execution therefor.

/s/ WJM
Judge

January 15, 1981

APPENDIX B

Unreported Order by Missouri Supreme Court Denying Petitioner's Application to Transfer Appeal

No. 64178

IN THE SUPREME COURT OF MISSOURI

WD Nos. 32436 & 32471

May Session 1982

Harold Alderson,
Appellant,

vs. TRANSFER

Clark Oil & Refining Corp., et al.,
Respondents.

Now at this day, on consideration of Respondents' Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

Gunn, J., not participating.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1982, and on the 13th day of September 1982, in the above entitled cause.

APPENDIX C

Opinion of the Missouri Court of Appeals, Western District, Officially Reported at 637 S.W.2d 84

Harold ALDERSON, Appellant,

v.

CLARK OIL & REFINING CORPORATION, et al., Respondents.

Nos. WD 32436, 32471.

Missouri Court of Appeals,
Western District.

May 4, 1982.

Motion for Rehearing and/or Transfer to Supreme Court Overruled and Denied June 23, 1982.

Application to Transfer Denied

Sept. 13, 1982.

Before CLARK, P. J., and MANFORD and KENNEDY, JJ.

KENNEDY, Judge.

Appellant Alderson, plaintiff below, appeals from a judgment setting aside a jury award of punitive damages in the amount of $100,000 and granting judgment in favor of defendant Clark Oil & Refining Company on the punitive damages issue. He appeals also from the trial court's conditional grant of a new trial on the punitive damages issue, in the event of reversal on appeal of the judgment N.O.V. in Clark's favor. A judgment for plaintiff for $1.00

actual damages, based upon the jury's verdict, was left intact.

Clark cross-appeals the judgment for plaintiff for actual damages in the amount of $1.00, alleging the constitutional invalidity of the service-letter statute, § 290.140, RSMo 1978.

Clark's allegation that the service-letter statute, § 290.140, RSMo 1978, is unconstitutional raises the threshold question of our jurisdiction. Missouri Constitution, Article V, § 3. All the constitutional arguments advanced in Clark's brief have been considered by our Supreme Court (since Clark's brief was filed) and rejected. *Hanch v. KFC National Management Corp.*, 615 S.W.2d 28 (Mo. banc 1981); *Accord: Rimmer v. Colt Industries Operating Corp.*, 656 F.2d 323 (8th Cir. 1981). Clark acknowledges in oral argument here that the statute's constitutionality is not now a viable issue. In such circumstances, the allegation of the statute's unconstituionality does not deprive us of jurisdiction. *Swift & Co. v. Doe*, 311 S.W.2d 15, 20-21[2] (Mo.1958); *City of Marshfield, ex rel. Hasten v. Brown*, 337 Mo. 1136, 88 S.W.2d 339, 340-341 (1935); *Renfrow v. Gojohn*, 600 S.W.2d 77, 79[3] (Mo.App.1980).

An earlier trial of the case resulted in a verdict for plaintiff of actual damages of $1.00 and $150,000 punitive damages.

The trial court after the first trial reduced the punitive damages to $100,000, the amount sought in the petition, then granted defendant's motion for a new trial when plaintiff refused to remit an additional $40,000. The second trial resulted in the verdict and judgment now under review.

Submissible issue of punitive damages.

The first question is the sufficiency of the evidence to make a submissible case on the issue of punitive damages. We hold there was sufficient evidence to make a prima facie case on that issue. The trial court erred in granting judgment N.C.V. for defendant Clark on that issue.

The facts as disclosed by the evidence are as follows:

Plaintiff Alderson had been employed with defendant Clark Oil & Refining Company since July, 1975. In May, 1976, he was promoted to service station manager and had continued to manage a Clark station until his discharge December 7, 1976. His immediate supervisor was the retail sales representative, Charles Palmquist. Palmquist was in turn supervised by the district sales manager, David DeNeff.

On December 7, 1976, in the late afternoon, plaintiff on his way home after leaving work stopped at another Clark station to see one Bob Thompson, the manager of the other station. There plaintiff met Charles Palmquist, his supervisor, introduced above. Palmquist suggested that the three of them go out for a drink. Thompson declined, but plaintiff and Palmquist left for a nearby lounge. They tarried there for what was apparently several hours. During the course of the evening, Palmquist repeatedly asked plaintiff his opinion of Bob Thompson's potential for advancement. Plaintiff eventually voiced his lack of confidence in Thompson's ability because of shortages at his station. This statement apparently angered Palmquist who stated that plaintiff was probably the one whose station was short. Plaintiff offered him the keys to his station and invited Palmquist to conduct an immediate audit. Palmquist declined. There was evidence from which the

jury could have found that Palmquist then discharged plaintiff from his employment.

After the two had parted company, plaintiff returned to his station. Palmquist had preceded him. Palmquist appeared to be intoxicated. Alderson summoned the police who asked Palmquist to leave, and Palmquist did so. Alderson then drilled open the safe because the safe had been tampered with and could not be opened with the keys. He removed upwards of $1,400 in cash. There is no claim that Alderson was exceeding his authority in doing this. He explained at the trial that he feared that Palmquist would fabricate a shortage of cash and that was his reason for taking the cash into his possession.

Plaintiff did not return to work after this time.

The next morning plaintiff met Palmquist at a doughnut shop at Palmquist's request. Palmquist asked plaintiff to forget the incident of the night before, but plaintiff refused.

Later on the same day, December 8, plaintiff received a call from David DeNeff, Palmquist's superior, who asked him to meet with him to discuss the situation. After hearing plaintiff's story, DeNeff indicated he would take action against Palmquist and made arrangements to meet with plaintiff again the next day to deposit the money which plaintiff had removed from the station safe. There was no discussion of shortages at plaintiff's station. DeNeff had never advised plaintiff that Clark was unhappy with his performance as a station manager. DeNeff said to plaintiff that "he would have to fabricate a reason for termination because they were doing it". Plaintiff's testimony indicates he understood that this statement referred to his own termination.

On December 15 Alderson requested a service letter from DeNeff. The letter, signed by DeNeff, stated that Alderson had been employed by Clark from July 2, 1975, until December 17, 1976, when he was terminated due to poor maintenance of the station, untimely filing of master reports and a shortage of $400 uncovered in an audit on December 7, 1976.[1] DeNeff admitted in his testimony on the trial that the date of the termination should have been December 7, 1976, and also admitted that the audit was conducted on the 8th, rather than on the 7th, and was not completed until the 9th. He acknowledged that the alleged shortage was not a reason for the discharge. He claimed that the audit did reveal a shortage of $696.55, a point which was sharply contested upon the trial. Plaintiff testified that he had applied for many jobs since the receipt of the service letter but had not

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1. The letter reads as follows:

December 22, 1976
Mr. Harold Alderson
554 Oxford
Independence, Missouri 64053

Dear Mr. Alderson:

This is in response to your letter of December 15, 1976. Be advised that you were employed by Clark Oil & Refining Corporation as a manager of one of our stations. In such capacity, your responsibilities included the general management of our station located at 202 West 23rd Street, Independence, Missouri. I have enclosed a copy of a job description for a further amplification of your duties as manager. You were employed from July 2, 1975, until December 17, 1976, and the reason you were terminated was that your performance simply was not satisfactory to Clark. That is, the station and its facilities were not maintained to Clark's standards, you did not furnish your Master Reports in a timely fashion to Clark, and on December 7, 1976, an audit uncovered a loss of almost $400.00 at the station you were managing.

Very truly yours,

Clark Oil & Refining Corporation
David W. DeNeff
District Manager

been hired. At the time of trial he was a welfare recipient.

Defendant Clark does not claim here that plaintiff did not make a submissible case for actual damages under the statute. Defendant's claim is that there was no case made out for punitive damages, a claim with which the trial court agreed in setting aside the punitive damages award to the plaintiff and awarding judgment N.O.V. to the defendant on that issue.

In order to make out a claim for punitive damages for the issuance by a defendant of a service letter containing false reasons for the plaintiff's discharge from his employment, plaintiff must show that the false statements of reasons were made with legal malice or with actual malice. This case was submitted upon a hypothesis of legal malice. With respect to legal malice justifying a punitive damages award, our Supreme Court has said, *Herberholt v. dePaul Community Health Center*, 625 S.W. 2d 617, 624 (Mo. banc 1981):

> Nominal damages, properly found, serve as an adequate basis for an award of punitive damages where either actual or legal malice is present. *State ex rel. St. Joseph Belt Railway Company v. Shane*, 341 Mo. 733, 108 S.W.2d 351 (1937), "Legal malice exists where a wrongful act is intentionally done without just cause or excuse; whereas actual malice or express malice exists when one with a sedate, deliberate mind and formed design injures another." *Schmidt v. Central Hardware Co.*, 516 S.W.2d 556 (Mo.App.1974).

To the same effect, see *Labrier v. Anheuser Ford, Inc.*, 621 S.W.2d 51, 58 (Mo. banc 1981).

There was evidence from which the jury could have found as their verdict shows that they did find, that the

reasons for plaintiff's discharge stated in the letter were false, and known by defendant's agent DeNeff to be so when the letter was written. There was evidence that there had never been any complaint from plaintiff's superiors about his maintenance of the station under his management, and never any complaint about the tardiness of his reports. There was evidence, too, that no shortage of $400 had been disclosed at the time of plaintiff's discharge, and that the shortage mentioned in the letter was not the reason for the discharge. Mr. DeNeff acknowledged in his trial testimony, in fact, that the shortage was not a reason for the discharge. There was the further testimony of plaintiff Alderson that Mr. DeNeff had told him on December 9 that "he would have to fabricate a reason for termination because they were doing it".

The evidence outlined in the preceding paragraph if believed by the jury, was sufficient to support a verdict for punitive damages. *Labrier v. Anheuser Ford, Inc.*, supra; *Herberholt v. dePaul Community Health Center*, supra; *Hanch v. KFC National Management Corporation*, supra.

Defendant Clark in its brief underlines testimony which contradicts plaintiff's case. It points to testimony which tends to show that plaintiff voluntarily quit, or offered to do so, on December 7, then on the next day undertook to withdraw his resignation. (The service letter itself contradicts that, however.) Defendant emphasizes the lack of detail in plaintiff's testimony of his discharge by Palmquist, and the lack of detail in his testimony about DeNeff's statement that he would have to fabricate a reason for discharging plaintiff. It points to its audit, made after the assumed December 7 termination date, showing that there was a shortage in the plaintiff's station accounts. Apparently it was this shortage—although unknown to

defendant at the time of the termination—which defendant posited in the service letter as a reason for termination. This is indicated by the fact that Mr. DeNeff sought by his trial testimony to reconcile the $400 figure in the letter with the $696.55 shortage shown in the audit. The audit was sharply contested by plaintiff, who claimed that it was altered by defendant to show a non-existent shortage. All of defendant's arguments, however, go only to credibility and weight of the evidence, a matter for the jury to determine. *Hartley v. Matejka*, 585 S.W.2d 240, 242[10] (Mo.App.1979); *Frisella v. Reserve Life Insurance Co. of Dallas, Tex.*, 583 S.W.2d 728, 734[14] (Mo.App. 1979). Our task upon appeal is at an end when we determine, as we have, that there was substantial evidence supporting the jury's verdict.

Propriety of trial court's conditional order of new trial.

Appellant's next assignment of error is directed at the trial court's conditional order granting the defendant a new trial on the issue of punitive damages, in case the judgment N.O.V. for defendant did not survive appeal.

Appellant's point must be sustained and the order granting a new trial must be set aside. The ground specified by the court for the new trial order was "that there was insufficient evidence to make a submissible case thereon, as alleged in paragraph 9 of defendant's alternative motion". Said paragraph 9 of defendant's motion was directed at the sufficiency of the evidence to make a submissible case on the issue of punitive damages.

The failure to make a submissible case is not grounds for a new trial, but only for a judgment N.O.V. *Smith v. J. J. Newberry Co.*, 395 S.W.2d 472, 474 (Mo.App. 1965). If the trial court grants a motion for a new trial

on that ground, when plaintiff has in fact made a submissible case (as we have held that he did), such order granting a new trial is arbitrary and an abuse of discretion. *Lifritz v. Sears Roebuck & Co.*, 472 S.W.2d 28, 33 (Mo. App.1971).

Propriety of instructions.

Defendant Clark, in defending the court's order granting a new trial, says that there were grounds in its motion for a new trial other than that upon which the trial court based its order, which were meritorious and which required a new trial on the punitive damages issue. *Kuzuf v. Gebhardt*, 602 S.W.2d 446, 451 (Mo. banc. 1980). It complains of two instructions:

It complains of plaintiff's verdict-directing instruction, which required a finding that the service letter did not "correctly state the true cause" of plaintiff's termination. The complaint is of the use of the words "correctly state the true cause" rather than the statutory term "truly state the reason". The instruction as given complies with the prescribed MAI instruction, MAI 23.08. Respondent gives us no authority supporting its position, and advances no reason how the variance in language from statute to instruction was in any way prejudicial.

It complains next of the court's defining "malicious" as legal rather than actual malice, using MAI 16.01. Respondent argues that actual malice should have been required to be found. That argument, though, has already been disposed of supra. *Herberholt v. dePaul Community Health Center*, supra; *Labrier v. Anheuser Ford, Inc.*, supra.

The judgment is reversed and the cause is remanded to the trial court with directions to reinstate the verdict and judgment for the plaintiff.

All concur.

APPENDIX D

Constitutional and Statutory Provisions Involved

Amendment I of the Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, ..."

Amendment XIV, Section 1, of the Constitution provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The essential statutory provision is Section 290.140, Revised Statutes of Missouri (1978), originally enacted by Missouri Laws 1905, p. 178, and reads as follows:

> "Whenever any employee of any corporation doing business in this state shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the written request of such employee to him, if such employee shall have been in the service of said corporation for a period of at least ninety days, to issue to such employee a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such

employee has quit such service; and if any such superintendent or manager shall fail or refuse to issue such letter to such employee when so requested by such employee, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment."

APPENDIX E

Partial Transcript of Oral Argument by Petitioner's Counsel Before Missouri Court of Appeals

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD-32436
WD-32471

HAROLD W. ALDERSON,
Appellant,

vs.

CLARK OIL & REFINING CORPORATION, et al.,
Respondents.

TRANSCRIPT OF PROCEEDINGS

(Partial)

BE IT REMEMBERED, that on this 15th day of March, 1982, the above-entitled matter being appealed from the Circuit Court of Jackson County, Missouri, held before the Honorable William J. Marsh, came on for hearing before the Honorable Donald B. Clark, Presiding Judge, and the Honorable Donald L. Manford and the Honorable Don W. Kennedy, Judges.

APPEARANCES:

Mr. Michael W. Manners appears for the Appellant, Harold W. Alderson.

Mr. William R. Williams appears for the Respondents, Clark Oil & Refining Corporation, et al.,

(WHEREUPON, the following proceedings were had.)

[2] * * *

JUDGE CLARK: Are you abandoning your contention as to the constitutionality of this case?

MR. WILLIAMS: At this time we do not realistically expect the Court to overrule the Missouri Supreme Court as to the constitutionality.

JUDGE CLARK: There is a question as to whether that issue is properly lodged in this court?

MR. WILLIAMS: And we do want to preserve it for possible transfer to the Supreme Court if we were to lose here, but then we are not really urging this Court to do it. However, we feel that the other grounds urged in our respondents' brief as to examining the various instructions, etc., in light of the constitutional challenges, we take that very seriously; and that is, that we feel that if you do reach that point, and we don't feel that you have to, but if you reach the point where you say, well, we are going to reverse Judge Marsh on the judgment and relief on the issue of whether or not a new trial should have been granted, whose very point as far as the instruction particularly in light of the constitutional challenges I don't think have ever been dealt with. Specifically if you deal with the question on whether or not you should correctly state the true reason.

Obviously, the case in '65 dealt with that and said that is sufficient, but I think that has to be reviewed, particularly when you have admitted a mistake in the letter if you get to that question of whether or not there is a new trial in light of the constitutional challenges. I also feel that there is a clear difference between the instructions now given in Federal Court that require actual malice

which at least in Judge Oliver's latest trial took out the use of the word "correctly" and the Missouri Supreme Court decision.

As far as Rimmer, I think Rimmer feels that you very clearly need actual malice to meet constitutional muster, and I would like to argue that I think Missouri Supreme Court has never dealt directly with that issue; that sometimes they have admittedly had language that said, Well, legal is sufficient as well as actual, but I don't think they have dealt with specifically the reason, or at least in the Rimmer opinion, they say the Missouri Court did not clearly articulate it. So I think that should be met only if the Court were to overrule Judge Marsh's judgment, taking away the verdict.

JUDGE CLARK: Thank you, Mr. Williams.

APPENDIX F

Missouri Approved Instructions Given by Respondent Alderson to the Jury in Missouri Circuit Court on the Question of Punitive Damages:

INSTRUCTION NUMBER 7

If you find the issues in favor of Plaintiff, and if you believe the conduct of Defendant as submitted in Instruction Number 5 was willful, wanton, or malicious, then in addition to any damages to which you find Plaintiff entitled under Instruction Number 6, you may award Plaintiff an additional amount as punitive damages in such sums as you believe will serve to punish Defendant and to deter it and others from like conduct.

MAI 10.01, Modified

Submitted by Plaintiff

INSTRUCTION NUMBER 8

The term "malicious" as used in these instructions does not mean hatred, spite, or ill will, as commonly understood, but means a doing of the wrongful act intentionally without just cause or excuse.

MAI 16.01, Modified

Submitted by Plaintiff

No. 82-981

In the Supreme Court of the United States

October Term, 1982

CLARK OIL AND REFINING CORPORATION,
Petitioner,

vs.

HAROLD W. ALDERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

Although Petitioner has ostensibly listed the parties to this action, it has not complied with Supreme Court Rules 34 (b) and 28.1. It is Respondent's understanding that Petitioner is a subsidiary of Apex Corporation. Hence, Petitioner did not list all of its "parent companies, subsidiaries . . . and affiliates . . . ." Rule 28.1.

Moreover, Petitioner has refused to comply with Rule 28.4 (c). Petitioner seeks to have a Missouri statute (*viz.* R.S.Mo. § 290.140) declared to be unconstitutional, but it has not recited in any document that it has served a copy of its Petition upon the Attorney General of the State of Missouri. Undoubtedly, this is because Petitioner is aware that the Attorney General of Missouri did seek to uphold the constitutionality of the statute in an earlier challenge in the lower federal courts, *Rimmer v. Colt Industries Operating Corp.*, 495 F. Supp. 1217 (W.D. Mo. 1980), *reversed*, 656 F.2d 323 (8th Cir. 1981).

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No. 82-981

In the Supreme Court of the United States

October Term, 1982

CLARK OIL AND REFINING CORPORATION,
Petitioner,

VS.

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STATEMENT OF THE CASE

Proceedings Below

Respondent believes certain facts regarding the course of proceedings below should be noted.

Respondent filed suit against Clark Oil & Refining Corporation in the Circuit Court of Jackson County, Missouri in March, 1977. Before Clark filed a responsive pleading, Respondent filed his First Amended Petition for Damages on May 4, 1977 (L.F. 1-6).[1] Respondent

1. Respondent is uncertain as to what portion of the record in the lower court is before this Court. Respondent will make reference to the Record on Appeal that was before the Missouri Court of Appeals.

alleged, *inter alia*, that Clark violated R.S.Mo. § 290.140 (the so-called Missouri Service Letter Law) by providing him with a service letter that lied about why it had discharged him from his employment with Petitioner. Petitioner filed its Answer to that Petition. Defendant did *not* claim in its Answer that § 290.140 was unconstitutional (L.F. 7-9).

Respondent's cause proceeded to trial in April, 1979, and on April 13, 1979, a jury returned a verdict in favor of Respondent, assessing damages of $150,001.00 against Petitioner (L.F. 10). Petitioner sought a new trial from this verdict but it did not attack the constitutionality of § 290.140 (L.F. 12-33).

The trial court ordered a new trial on July 24, 1979 (L.F. 36).

Thereafter, on August 22, 1979, Respondent filed a Second Amended Petition for Damages quite similar to his earlier Petition except that Respondent increased the amount of damages he sought to recover (L.F. 37-40). Petitioner filed an Answer to this Petition, but again it did not raise the issue of constitutionality (L.F. 41-42). Finally, on March 26, 1980, Clark amended its Answer to raise the issue of constitutionality (L.F. 49-50).

Respondent's cause proceeded to trial a second time in September, 1980, and on October 2, 1980, the jury returned a verdict against Clark, this time assessing damages of $100,001.00 (L.F. 70).

Thereafter, Petitioner moved to set aside this verdict on multitudinous grounds (L.F. 72-86). The trial court obliged Petitioner again on January 15, 1981, granting a judgment notwithstanding the verdict based on a finding that there was insufficient evidence of legal malice to support an award of punitive damages. The trial court

left the award of actual damages intact (L.F. 88-89). The trial court expressly eschewed Clark's constitutional argument (L.F. 87).

Thereafter, Respondent appealed the decision of the trial court to the Missouri Court of Appeals. Petitioner filed a cross-appeal from the decision of the trial court that allowed the jury's verdict on the issues of liability and actual damages to stand. Petitioner's cross-appeal *only* challenged the constitutionality of R.S.Mo. § 290.140; it did *not* challenge the sufficiency of the evidence to support the jury's finding that Clark falsely stated its reasons for discharging Respondent.

The Missouri Court of Appeals found for Respondent on May 4, 1982, *Alderson v. Clark Oil & Refining Corporation*, 637 S.W.2d 84.

No exposition of the progress of this case would be complete without digressing for a moment to consider the history of the challenges to this statute.

In 1922 this Court upheld the statute Petitioner is now challenging in *Prudential Insurance Company of America v. Cheek*, 259 U.S. 530 (1922). The challenge in that case was based on traditional equal protection grounds.

In 1980 the assault on the Service Letter Statute was renewed when the United States District Court for the Western District of Missouri struck down the statute as being void for vagueness and violating the equal protection clause of the Fourteenth Amendment, *Rimmer v. Colt Industries Operating Corp.*, 495 F. Supp. 1217. The real key to *Rimmer* (and the way the court circumvented *Cheek*, supra) was a holding that false utterances in service letters about an employee's work history are protected by the First Amendment per *Gertz v. Robert Welch, Inc.*,

418 U.S. 323 (1974), thereby triggering stricter scrutiny for vagueness and equal protection purposes. That holding was appealed by plaintiff to the United States Court of Appeals for the Eighth Circuit.

Within a few months both the Missouri Supreme Court and the Eighth Circuit (in *Rimmer*) were faced with constitutional challenges to the statute reflecting the reasoning of the district court in *Rimmer*. The Missouri Supreme Court acted first, and on April 6, 1981, that Court declined to follow the federal district court, upholding the statute, *Hanch v. K.F.C. National Management Corporation*, 615 S.W.2d 28 (Mo. en banc 1981). Although this was a four to three opinion, only one of the dissenting opinions rested on constitutional grounds. Four months later the Eighth Circuit reversed the district court in *Rimmer v. Colt Industries Operating Corp.*, 656 F.2d 323.

The key to both the Supreme Court and Eighth Circuit Opinions was a finding that the First Amendment did not shield corporate employers that make false statements about employees. Having resolved the First Amendment issue, the courts applied traditional standards of review in resolving the vagueness and equal protection issues.

Neither of the losing parties in *Hanch* and *Rimmer* sought review by this Court.

Details of the Case

Although Petitioner *generally* sets out details of the facts in this case it omits certain facts that were relevant to the Court of Appeals in its Opinion of May 4, 1982.

First, Respondent established evidence that was uncontroverted that Petitioner's agent, DeNeff, said that he would fabricate reasons for discharging Respondent (T. 40,

69-70). Although DeNeff testified extensively at trial, he *never* denied that he had expressed an intention to lie about Petitioner's reasons for terminating Respondent. DeNeff was, of course, the same person who signed the service letter that formed the basis of this cause.

Second, Petitioner's explanation of its reasons for discharging Respondent suffered from inconsistencies. Respondent claimed he was discharged on December 7, 1976, and Clark's service letter tended to confirm this.[2]

In its service letter Petitioner claimed it terminated Respondent because of a shortage of funds uncovered in an audit on December 7, 1976, which was consistent with a termination date of December 7. At trial, however, DeNeff admitted that no audit was conducted on December 7 (T. 158). The only audit that was performed by Petitioner was conducted on December 8, 1976, the day *after* Respondent's discharge. Obviously Respondent was not discharged because of alleged shortages that were not uncovered until *after* his discharge.

Moreover, Petitioner had a hard time deciding how Respondent was separated from his employment. Respondent claimed he was fired by Petitioner. In the service letter Petitioner agreed that *it* terminated Respondent's employment. However, when DeNeff answered interrogatories under oath on behalf of Petitioner, he claimed that Alderson quit his job (T. 89). In his live testimony DeNeff resolved this dilemma by taking two mutually exclusive positions: part of the time he claimed Respondent resigned and part of the time he claimed that he

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2. The service letter said that Alderson was terminated on December 17, 1976, but DeNeff acknowledged that the 17th was a typographical error and the letter should have read December 7th (T. 158).

terminated Respondent.[3] Of course if DeNeff told the truth when he swore to the aforementioned interrogatory answer, he lied in the service letter and vice versa.

Finally, the manner in which Clark calculated the alleged shortages was in issue. Respondent denied that there was *any* shortage. Petitioner's records did reflect a shortage, but the amount of that shortage was diverse. Clark claimed variously that the amount of the shortage was $655.98 (P. Ex. 11a), $685.28 (P. Ex. 12), $611.78 (P. Ex. 22), $781.32 (P. Ex. 8a), $696.55 (P. Ex. 9a), and $400.00 (P. Ex. 21). Respondent also adduced evidence that Clark altered one of its documents to show a "shortage" (P. Ex. 12a).

One other fact should be noted. In its service letter Clark claimed that Respondent was discharged because his station was not clean and because of a failure to timely file certain records, and DeNeff testified that he had reprimanded Respondent for those reasons (T. 123). Respondent denied that DeNeff *ever* reprimanded him (T. 25-26).

In short Respondent claimed that Petitioner set out with an avowed intention to fabricate reasons for discharging him. Thereafter, Respondent claimed, Petitioner did just that by claiming that it fired him for shortages uncovered after he was fired, by manufacturing those shortages, and by falsely claiming a history of reprimands for station cleanliness and inadequate record-keeping.

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3. DeNeff never explained why the letter claimed Clark fired Alderson if, in fact, Alderson quit. Presumably, the letter was written when DeNeff was in a "discharge" rather than "resignation" mood.

SUMMARY OF ARGUMENT

R.S.Mo. § 290.140 (1978), the so-called Service Letter Law, is not void for vagueness. Requiring an employer to "truly state" why it has discharged an employee does not require it to guess at the meaning of the law. All the statute requires (as construed by Missouri courts) is that an employer truthfully state the reason it discharged an employee even though the facts underlying that reason may be false.

The statute also does not infringe on employers' freedom of speech. The statute punishes conscious deceit. This Court has repeatedly held that the intentional lie is outside the scope of First Amendment protections.

Permitting punitive damages in service letter cases on a finding of what Missouri calls "legal malice" is not a violation of First Amendment rights. In a service letter case legal malice means intentionally stating false reasons for discharge, knowing that they are false. Such a finding is the equivalent of what this Court has required in defamation actions.

Finally, the fact that the statute is limited to corporate employers does not violate the equal protection clause of the Fourteenth Amendment. The statute does not burden fundamental rights or proceed along suspect lines. The statute is rationally related to a legitimate state interest.

REASONS FOR DENYING THE WRIT

I. The Missouri Service Letter Law Is Not Void for Vagueness nor Does It Impermissibly Infringe on the First Amendment Rights of Corporate Employers.

Before turning directly to Clark's vagueness arguments, certain principles regarding the "void-for-vagueness" doctrine should be noted.

First, when determining whether a statute is overly vague, the threshold question to be addressed is whether the statute is such that "men of common intelligence must guess at its meaning," *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973). This does not mean that the language of the statute must specifically address every possible contingency that may arise thereunder. As this Court noted in *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 578-579 (1973): "[T]here are inherent limitations in the English language with respect to being both specific and manageably brief . . . ." The Court eschewed an attitude "intent on finding fault at any cost . . . ." In the context of Petitioner's argument, the Court must determine whether a statute that requires an employer to truly state its reason or reasons for discharging an employee would cause persons "of common intelligence [to] guess at its meaning."

Second, in determining whether a statute is vague, a person governed thereby is charged with knowledge of all judicial interpretations of the statute, as well as knowledge of the statute itself, *Winters v. New York*, 333 U.S. 507, 514-515 (1948). State statutes are reviewed by federal courts as though they read the same as state

appellate courts have interpreted them, *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 273 (1940). Hence, in determining whether § 290.140 is vague, Clark must be held to knowledge of any Missouri appellate decision construing the statute.

Finally, the degree or rigor applied by this Court in reviewing the question of vagueness is directly proportional to the extent that the statute affects fundamental rights. Thus, where a statute governs business activities, the degree of leeway accorded a state legislature is much greater, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

Clark's main complaint as to vagueness is that it does not understand the command of the statute that requires an employer to issue a letter (upon request) "truly stating what cause, if any" it had for discharging an employee. Apparently Clark's argument is that it does not know what the truth means.[4]

The absurdity of Clark's argument is probably its best answer. If all statutes that required people to tell the truth were vague, then very few laws would stand.

Clark argues that it does not know if truly state means that it must state "just," or "correct," or "substantially true" reasons. Petitioner argues, for example, that it is unclear whether the statute is satisfied when the employer believes the reasons for discharge to be true.

It is difficult to think of a more ludicrous claim. As construed by Missouri courts, all the Service Letter Statute

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4. Clark's utter indifference to the truth, documented by the record in the lower court, might tend to indicate a moral incapacity that borders on sociopathic mendacity. Clark does not claim, however, that its inability to distinguish truth from falsehood is pathological in its origins.

requires is that an employer truly state its own subjective reason for discharge. Even if the employer is completely mistaken as to the factual basis for its decision to discharge an employee, it does not violate the statute so long as it accurately states its reason for discharge.

A good example of how that rule works in practice is provided by *Newman v. Greater Kansas City Baptist and Community Hospital Association*, 604 S.W.2d 619 (Mo. App. 1980). In that case plaintiff was discharged for allegedly stealing purses on hospital premises. That reason was given in her service letter as being the true cause for her discharge. At trial plaintiff proved conclusively that she was not guilty of the thefts, but she did not prove that her employer did not *believe* her to be a thief when it discharged her. Because of an absence of evidence on this latter point, a verdict for plaintiff was reversed. In doing this, the Court of Appeals noted that:

> There can be no doubt that in the absence of the [service letter] statute, Paula Newman was subject to dismissal at will and without explanation [citation omitted]. The right Paula Newman claims can derive only from the statute which became part of her arrangement for employment with the hospital. [Citation omitted.] The contention that evidence that she did not steal proves a submission under the statute—without other contradiction that it was not the true cause of discharge—disallows an employer even the benefit of an honest sincerity and invests to an employee a right akin to property. The plaintiff would require that the cause stated be actual in fact—that is, for cause—and by implication impose liability for failure of investigation and judgment. *The statute does not go that far as a remedy.*

(Emphasis added.) *Ibid.*, at 622-623. The Supreme Court of Missouri made a similar pronouncement in *Labrier v. Anheuser Ford, Inc.*, 621 S.W.2d 51, 56-57 n.2 (Mo. en banc 1981). *See also*: *Williams v. Kansas City Transit, Inc.*, 339 S.W.2d 792 (Mo. 1960). The statute *only* imposes liability when an employer falsely states its own subjective reason for discharging an employee.

In the case *sub judice* Alderson did not argue that Clark violated the statute because it falsely claimed that he was responsible for shortages. Rather, he contended that Clark's violation stemmed from falsely accusing Respondent of being a thief *and* claiming that was the reason for discharge when Clark knew that it did not discharge him for that reason.

How a law that requires an employer to simply tell the truth *about what it believes* can be held to be void for vagueness is a riddle. Unfortunately, it is a riddle for which Petitioner has no solution.

Petitioner next argues that the Service Letter Law violates First Amendment rights of employers by disallowing them good faith mistakes and imposing strict liability for such good faith mistakes. In making this argument, Clark relies on the line of cases concerning defamation actions represented by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Petitioner's characterization of the status of the Service Letter Law—that it penalizes good faith mistakes—is absolute nonsense. Such was the holding in *Rimmer v. Colt Industries Operating Corp.*, 656 F.2d 323, 328 (8th Cir. 1981), wherein the Court correctly noted that, "Missouri has decided that a corporate employer has no *right*

to lie about a former employee's job history." (Emphasis added.)

In its defamation cases this Court has never held that the First Amendment extends its protections to intentional deceit; indeed quite the opposite is true. In *Garrison v. Louisiana,* 379 U.S. 64, 75 (1964), the Court noted that:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. * * * * That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. * * * * Hence, the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Not surprisingly Petitioner makes no attempt to claim that its particular falsehoods were uttered in good faith. Two juries and one appellate court found that Petitioner claimed it fired Alderson because he was a thief, *knowing* that accusation was utterly and completely false. No one had to engage in metaphysical dialogues to measure Petitioner's mendacity; the clear evidence was that it *lied* about Alderson's work history. Petitioner's attempt to cloak itself in the protection of the First Amendment is at once disingenuous and disgusting.

Clark's inability to claim its own good faith is fatal to its vagueness argument. Even if one assumes, *arguendo,*

that it is theoretically possible that some employer, somewhere, might someday make a good faith mistake in stating why it fired an employee and be held liable under the statute therefor, that is not the case *sub judice*. A statute "will not be struck down as vague, even though marginal cases could be put where doubts might arise." *U.S. Civil Service Commission*, supra, 413 U.S., at 579.

The statute is not void for vagueness.

II. Allowing Punitive Damages on a Finding of What Missouri Law Describes As "Legal Malice" in a Service Letter Case Is Not in Conflict With Constitutional Protections for Freedom of Speech.

Under the cases construing the Service Letter Law, punitive damages may be returned if the jury finds the the employer guilty of what Missouri law calls "legal malice," *Herberholt v. dePaul Community Health Center*, 625 S.W.2d 617, 624 (Mo. en banc 1981). Petitioner claims that allowing punitive damages without a showing of actual malice is constitutionally deficient under *Gertz v. Robert Welch, Inc.*, supra, and *New York Times Co. v. Sullivan*, supra. A number of responses are appropriate.

First, what constitutes legal malice in Missouri should be considered. The Missouri Supreme Court has described legal malice as follows: "Legal malice exists where a wrongful act is intentionally done without just cause or excuse . . . ." *Herberholt*, supra, 625 S.W.2d at 624. "This means that defendant not only intended to do the act which is ascertained to be wrongful, *but that he knew that it was wrongful when he did it.*" (Emphasis added.) *Beggs v. Universal C.I.T. Credit Corporation*, 409 S.W.2d 719, 723 (Mo. 1966). In contrast under Missouri law actual malice "exists when one with a sedate, deliberate

mind and formed design injures another." *Herberholt*, supra, 625 S.W.2d, at 624.

Respondent would submit that a finding of what Missouri describes as legal malice is no different from what this Court required in *Gertz*, supra, and *New York Times v. Sullivan*, supra, 376 U.S., at 279-280, namely that defendant made a false statement "with knowledge that it was false or with reckless disregard of whether it was false or not."

In the context of a Service Letter case a defendant may be held liable for punitive damages only if it makes false statements as to why it discharged an employee *and* if it acts with legal malice, i.e. it makes false statements intentionally and knowing that they are wrong, *Beggs*, supra; cf. *Booth v. Quality Dairy Co.*, 393 S.W.2d 845, 851 (Mo. App. 1965).

If a jury were required to find "actual malice" as defined by Petitioner (*viz.* ill will), such a standard itself would be constitutionally deficient, *Garrison v. Louisiana*, supra, 379 U.S., at 78-79; and *Meiners v. Moriarity*, 563 F.2d 343, 350-351 (7th Cir. 1977).

Clearly, there is no conflict between the standard prescribed in *Gertz* and *New York Times* and the standard by which punitive damages are awarded in Service Letter cases.

In order for Clark to be guilty of legal malice in the case at bar, it had to make false statements about Alderson's work history, *knowing that such statements were false.* As the Missouri Court of Appeals noted in commenting on the sufficiency of the evidence in the case *sub judice* to warrant a finding of legal malice:

> There was evidence from which the jury could have found, as their verdict shows that they did find, that the reasons for plaintiff's discharge stated in the letter were false, *and known by defendant's agent DeNeff to be so when the letter was written.*

(Emphasis added.) 637 S.W.2d, at 87.

Petitioner's attempted distinction between "legal malice" and "actual malice" is nothing more than semantic sleight of hand. The important thing to remember is that under Missouri law a finding of legal malice requires a finding of intentional deceit. Such a finding is not at odds with constitutional minima.

III. The Service Letter Law Does Not Violate the Equal Protection Clause of the Fourteenth Amendment; the Statute Is Rationally Related to a Legitimate State Interest.

Petitioner's final (and most confusing) argument is that corporations are denied equal protection because the Service Letter Law is limited to corporate employers. Respondent believes that the Eighth Circuit demolished this argument in *Rimmer*, supra, 656 F.2d, at 329. He would merely add that a similar holding was made in *Buckley v. Valeo*, 424 U.S. 1, 105 (1976) when this Court noted:

> In deciding the constitutional propriety of the limitations in such a reform measure we are guided by familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," . . . and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

This Court has traditionally avoided the role of a super-legislature in determining whether a legislative regulation may be applied to one group and not another where the legislative policy does not affect fundamental rights or proceed along suspect lines, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); and *Clements v. Fashing*, ... U.S. ....., 73 L.Ed. 2d 508 (1982). Of course corporations are not part of any "suspect class" so attention must be focused on the question of whether the Service Letter Law affects fundamental rights.

As was noted above the kind of speech punished in service letter actions is the known falsehood. Since that category of speech is not protected by the First Amendment, *Garrison v. Louisiana*, supra, it follows that no fundamental right is affected by the statute.

The mere fact that the Missouri legislature chose to limit the protection of the Service Letter Law to corporate employees does not mean that the statute is unconstitutional. As Justice Pitney noted sixty years ago, there is clear justification for the existence of the statute, *Prudential Insurance Company of America v. Cheek*, 259 U.S. 530 (1922). The statute is rationally related to a legitimate state interest, *Rimmer*, supra, 656 F.2d, at 329.

CONCLUSION

Respondent sincerely believes that the Petition for Certiorari filed herein is entirely groundless. He would urge this Court to study carefully the opinions in *Hanch*, supra, and *Rimmer*, supra, and deny Clark's Petition.

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